In the Supreme Court of the United States

OCTOBER TERM, 1922.

COMMISSIONER OF IMMIGRATION OF PORT of New York, petitioner,
v.
GITTEL AND ISRAEL GOTTLIEB. } No. —.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Comes now the Solicitor General of the United States and on behalf of petitioner prays the court to grant a writ of certiorari to review the judgment of the United States Circuit Court of Appeals entered in the above-entitled cause.

QUESTION INVOLVED.

The question presented is whether the so-called Quota Act of May 19, 1921 (42 Stat., chap. 8, p. 5), forbids, after the quota is exhausted, the entry into the United States of the wife and minor child of a resident alien, to wit, a minister of the Gospel, who has declared his intention to become a citizen of the United States. The trial court and the Circuit Court of Appeals have answered the question in the negative and ordered the discharge of the aliens.

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STATUTES INVOLVED.

The pertinent parts of the so-called Quota Act of May 19, 1921 (42 Stat. 5), are contained in Sections 2 and 4 thereof, and read as follows:

> SEC. 2 (a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits provided in this Act: (1) Government officials, their families, attendants, servants, and employees; (2) aliens in continuous transit through the United States; (3) aliens lawfully admitted to the United States who later go in transit from one part of the United States to another through foreign contiguous territory; (4) aliens visiting the United States as tourists or temporarily for business or pleasure; (5) aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration; (6) aliens from the so-called Asiatic barred zone, as described in section 3 of the Immigration Act; (7) aliens who have resided continuously for at least one year immediately preceding the time of their admission to the United States in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, countries of Central or

South America, or adjacent islands; or (8) aliens under the age of eighteen who are children of citizens of the United States.

* * * * *

(d) When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this Act shall have been admitted all other aliens of such nationality, except as otherwise provided in this Act, who may apply for admission during the same fiscal year shall be excluded: *Provided,* That the number of aliens of any nationality who may be admitted in any month shall not exceed 20 per centum of the total number of aliens of such nationality who are admissible in that fiscal year: *Provided further,* That aliens returning from a temporary visit abroad, aliens who are professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors for colleges or seminaries, aliens belonging to any recognized learned profession, or aliens employed as domestic servants, may, if otherwise admissible, be admitted notwithstanding the maximum number of aliens of the same nationality admissible in the same month or fiscal year, as the case may be, shall have entered the United States; but aliens of the classes included in this proviso who enter the United States before such maximum number shall have entered shall (unless excluded by subdivision (a) from being counted) be counted in reckoning the percentage limits provided in this Act: *Provided further,* That in the enforcement of this Act preference shall be given so far

> as possible to the wives, parents, brothers, sisters, children under eighteen years of age, and fiancees, (1) of citizens of the United States, (2) of aliens now in the United States who have applied for citizenship in the manner provided by law, or (3) of persons eligible to United States citizenship who served in the military or naval forces of the United States at any time between April 6, 1917, and November 11, 1918, both dates inclusive, and have been separated from such forces under honorable conditions.
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> SEC. 4. That the provisions of this Act are in addition to and not in substitution for the provisions of the Immigration laws.

The Circuit Court of Appeals bases its opinion largely upon the closing portion of Section 3 of the Immigration Act of February 5, 1917 (39 Stat. 874, 876), and while we believe it can be demonstrated that said statute has no place in the solution of the question presented, it is nevertheless deemed advisable to set it forth at this point. The provision reads as follows:

> The provision next foregoing, however, shall not apply to persons of the following status or occupation: Government officers, ministers, or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travelers for curiosity or pleasure, nor to their legal wives or their children under sixteen years of age who shall accompany

them or who subsequently may apply for admission to the United States, but such persons or their legal wives or foreign-born children who fail to maintain in the United States a status or occupation placing them within the excepted classes shall be deemed to be in the United States contrary to law, and shall be subject to deportation as provided in section nineteen of this act.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals in this case materially affects the administration of the so-called Quota Act, in that a principle of construction is announced which will open the door to the entry of many aliens who are able to establish a right of entry under the earlier immigration laws, although their entry when tested solely by the Quota Act is forbidden.

2. The decision of the Circuit Court of Appeals is demonstrably in error, and does not represent a possible construction of the law which should be acquiesced in because it maintains the unity of the family.

ARGUMENT.

The Circuit Court of Appeals, in its opinion, asserts (1) that the Quota Act, in Section 4, provides that such Act is "in addition to and not in substitution for the provisions of the immigration laws"; (2) that Section 3 of the Immigration Act of 1917, *supra*, specifically permitted the entry into the country,

among others, of *ministers*, "*their* legal wives, or their children under sixteen years of age"; and (3) therefore construing the two provisions as being in *pari materia*, the omission from the Quota Act of wives and children of exempt aliens can not be construed to take away the right which, the court contends, such wives and children possessed under Section 3 of the Immigration Act. The court appears to have adopted this reasoning because of what is conceived to be the legislative intent not to separate families.

The error in the court's ruling may be shown by the following propositions:

1. The very structure of Section 3 of the Immigration Act, *supra*, compels the conclusion that the right to enter therein conferred upon the wives and children of ministers was incorporated into the section as an exception only to the previous provision therein relating to the exclusion of aliens coming from certain defined geographical limits. The aliens here involved do not come from that zone, and therefore do not fall within the exception here dealt with.

2. Conceding, *arguendo*, that the court below correctly interpreted the exception contained in Section 3 as covering aliens from whatsoever country they might come, its ruling is still open to attack, for when the fundamental nature of immigration laws is borne in mind the right of an alien to enter, where that right is specifically granted by statute, stands upon no higher plane than the right of an

alien to enter where such right exists because no provision of law can be found denying admission. This being so, and there is no escape from its correctness, then the principle announced by the court below would, if adhered to, work a substantial destruction of the Quota Act, which, by its very terms, reveals its purpose to absolutely close the doors to the admission of all aliens after the maximum percentages are reached, except those specifically mentioned in said Quota Act. Otherwise, if the rule announced by the court below be sound, it was not necessary for the aliens here involved to place their finger upon some specific provision of the immigration laws permitting their entry, but the burden rather rested upon the Government to point out some specific provision of said laws denying their entry. This, of course, the Government could not do, because, as hereinbefore indicated, immigration laws are fundamentally exclusion laws, and all aliens may enter who are not by the clear terms of such laws denied admission. To illustrate, the Quota Act exempts, among others, attendants and servants of foreign representatives, and also "aliens employed as domestic servants." The Quota Act specially exempts families of foreign representatives. Is it reasonable to suppose that it was intended by implication to extend the same privilege of entry to the families of the menials just mentioned? If the rule of the court below be adopted, such rule must embrace such families, for

there is no provision of the immigration laws excluding them.

3. The further contention of the Court of Appeals that as the Immigration Act specifically permitted the entry of ministers, and their wives and minor children, such right was not intended by Congress to be taken away by the Quota Act which in exempting ministers failed to specifically mention their wives and children, overlooks the fact that an analysis of the Quota Act discloses that the omission was not inadvertent, but intentional, e. g., observe that in the closing portion of Section 2 provision is made that where more aliens apply at one time than can be permitted to enter because the maximum percentage would thereby be exceeded, a mere preference right of entry is accorded to such of them as happen to be wives, children, and others of specified aliens. The aliens here involved fall definitely within this mere preference provision of the Quota Act (see clause "2" of paragraph "d," section 2 of said Act, *supra*), and not within the specified classes who are granted absolute right of entry by Section 2, paragraph "a" of the Act without regard to the percentage limits.

4. The provision in Section 4 of the Quota Act declaring that said Act is "in addition to and not in substitution for the provisions of the immigration laws," was undoubtedly introduced to preclude the Quota Act from being interpreted as embracing the sole test of entry, i. e., after an alien was able to

overcome the terms of the Quota Act, either by bringing himself within its express exempting or percentage provisions, said alien must still satisfy the requirements of the Immigration Act as a condition to gaining entry. The ruling of the court below reverses the order of the statutes, and because it finds what it regards as a right of entry under the immigration laws, it therefore concludes that in order to preserve such right it is justified in reading into the Quota Act words which the structure of the Act discloses Congress intentionally omitted. The true relationship between the Immigration Act and the Quota Act is not dissimilar in principle to that existing between the Immigration Act and the Chinese Exclusion laws, as pointed out by this court in *United States* v. *Wong You*, 223 U. S. 67, 70. In that case it was said:

> To allow the immigration act its literal effect does not repeal, alter, or amend the laws relating to the Chinese, as it is provided that it shall not, in § 43.

So here to allow the Quota Act its literal effect would not cause it to repeal or alter the Immigration Act.

If it seems desirable that cases like those here involved should be exempted from the excluding provisions of the Quota Act, such *casus omissus* can be supplied only by legislative action. This court has not, in the past, hesitated to so construe the immigration statutes as to work hardships in the

family relationship where it reached the conclusion that the plain terms of the statute required such construction. *Zartarian* v. *Billings*, 204 U. S. 170; *Yee Won* v. *White*, 256 U. S. 399.

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